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IN THE

Supreme Court of the United States

October Term 1966

No. 527

VINCENT PACELLI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

VINCENT PACELLI, *Petitioner*,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Vincent Pacelli, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on July 8, 1966.

Citations to Opinions Below

The opinion and judgment of the United States Court of Appeals for the Second Circuit are unreported as yet and are printed as Appendix A hereto, *infra*, p. 1a. There was no opinion of the District Court.

Jurisdiction

The opinion of the Second Circuit was rendered on July 8, 1966. On August 10, 1966, Mr. Justice Harlan granted an extension of time to and including September 6, 1966, in which petitioner could file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner Pacelli was indicted for violating 21 U.S.C. §§ 173 and 174. The indictment charged that Pacelli, eleven co-defendants and sixteen co-conspirators had engaged in a conspiracy to import narcotics into the United States and sell them illegally. Six of the defendants, including Pacelli, stood trial together. Four were found guilty and two not guilty. Pacelli received a sentence of eighteen years and a $20,000 fine.

The trial was long and sharply contested. The heart of the Government's case came from the testimony of a group of witnesses whose accomplishments in addition to trafficking in narcotics included perjury, armed robbery, adultery, and bastardy, and upon whom the Government had lavished substantial cuts in prison terms. As to Pacelli, the Government's direct case was wholly uncorroborated by disinterested witnesses. For the jurors the case was a difficult and troublesome one. They retired shortly after noon and did not return their verdict until four o'clock on the following afternoon.

The facts necessary to an understanding of the points presented by Pacelli are set forth in the subsequent portions of this petition which deal with those points. Suffice it to say here that the Government pre-

sented evidence which, if believed, tended to show the operation of a narcotics ring between France and the United States. According to the Government, Pacelli and a man named Schoenfeld were customers of an importation group. Narcotics were picked up from couriers traveling by air and delivered to customers in New York. The principal witness, Charles Hedges, was a self-described hoodlum (Tr. 425) who received a ten-year cut in his prison sentence. Most of the defense evidence directly or indirectly contradicted various aspects of the Government's case.

QUESTIONS PRESENTED

1. (a) In a criminal trial for participation in a conspiracy to violate the narcotic laws, did the trial court violate the self-incrimination and due process clauses of the Fifth Amendment; the right-to-trial provisions of both Article III, § 2, of the Constitution and the Sixth Amendment; and 18 U.S.C. § 3481, by charging the jurors three times that they could convict unless petitioner, who did not take the stand, explained his possession of narcotics to their satisfaction?

(b) Did the trial court by the same instructions convert the statutory inference into a conclusive presumption and thus violate petitioner's Fifth and Sixth Amendment rights?

2. Were petitioner's Fifth and Sixth Amendment rights to a fair trial by an impartial jury violated by (a) newspaper stories, generated by Government sources, which branded petitioner guilty of narcotic violations and in addition accused him of complicity in murder, and by (b) a national magazine article published midway in the trial which was authored by the head of the Government's Bureau of Narcotics and

which detailed the very conspiracy at issue in the trial?

3. (a) Was petitioner denied a fair trial and a unanimous jury verdict by submissions and instructions to the jury to the effect that the overt act alleged in the indictment could be proved by evidence of entirely different acts never presented to the Grand Jury, thus (a) inaccurately portraying the evidence, (b) allowing the jury to make an assumption not based on the evidence, (c) leaving to the jury an issue properly for the court, and (d) enhancing the confusion of an already badly-confused jury?

(b) If a jury must find one of two overt acts in order to convict and does not specify which one it relied upon, can a conviction stand after the judge purported to restrict the jury to the indictment but then specified as one of the overt acts an event which in fact had never been presented to the Grand Jury?

CONSTITUTION AND STATUTES

Article III, Section 2 of the Constitution of the United States provides in part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made * * *.

The Fifth Amendment to the Constitution of the United States provides in part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the Constitution of the United States provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *.

Title 18, United States Code, Section 3481 provides:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

Title 21, United States Code, Section 173 provides:

> § 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.*—It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Title 21, United States Code, Section 174 provides:

§ 174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more

than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT'S INSTRUCTIONS WERE ERRONEOUS AND UNCONSTITUTIONAL

A. The trial court commented adversely on petitioner's failure to testify and thus violated his rights under the Fifth and Sixth Amendments, Article III, and 18 U.S.C. §3481

Three times during the course of his instructions, the trial judge told the jury that petitioner Pacelli had to explain to the jury his possession of narcotics. Pacelli did not explain his possession, because he never took the stand. Therefore, these instructions denied Pacelli his right guaranteed by the Fifth Amendment not to be compelled to be a witness against himself, due process of law guaranteed by the Fifth Amendment, and his right to trial by jury guaranteed both by Article III, § 2, of the Constitution and by the Sixth Amendment. The instructions also violated 18 U.S.C. § 3481.[1]

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[1] "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory; the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

The trial court instructed the jury in part:

> Section 174 further provides that if a defendant is shown to have had possession of the narcotic drug, such possession, *unless the defendant explains the possession to your satisfaction,* may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation of the narcotic drug contrary to law.
>
> * * * * * * *
>
> The government contends, and each of the defendants denies, that each defendant had knowledge of the illegal importation of the narcotic drug. The government contends that the evidence shows that each of the defendants except Alfred Armone was shown to have had actual or constructive possession of the narcotic drug and that *they have not offered an explanation as to their possession.* You will recall that Section 174 which I just referred to, provides that if a defendant has actual or constructive possession of the narcotic drug, you may infer that he knew the narcotics were illegally imported into the United States *unless he has given you a satisfactory explanation of his possession.* [J.A. 444a; emphasis added.]

Petitioner specifically objected to these instructions as being in violation of his constitutional and statutory rights, both before and after the instructions were given at trial, and in his brief to the Court of Appeals. (J.A. 368a-374a, 377a, 494a-495a; Brief for Appellant Pacelli, pp. 5, 23-36). The Court of Appeals specifically rejected petitioner's constitutional argument but ignored his argument under 18 U.S.C. § 3481. (App. 5a-9a.)

The trial court purportedly based its instruction upon 21 U.S.C.A. § 174, which provides:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The Government realized that an instruction literally adopting and applying this statutory language would violate the petitioner's constitutional rights by forcing him to testify, by adversely commenting upon his failure to testify, and/or by using his failure to testify as a ground for convicting him. Therefore, the Government submitted the following language as part of its Request-to-Charge Number 7:

> You may draw the inference that the narcotics were illegally imported and the defendant knew of the illegal importation if you find the defendant had possession of the narcotics *and the evidence in the case does not provide a satisfactory explanation* of the defendant's possession, either actual or constructive. [Court's Ex. 6 for identification, J.A. 512a; emphasis added.]

This language would have correctly charged the jury that possession may lead to an inference of guilt unless *the evidence as a whole* provides an adequate explanation of that possession. The trial court, however, rejected this language and instead told the jury three times that the *defendant* must *explain* his possession.

The court did not even charge that the defendant must explain his possession by all of the evidence in the case. Such a charge, although still improper, at

least would have implied that the defendant could have offered an explanation by some means other than through his own mouth. Instead, the trial court instructed simply that the defendant must explain, and this charge could only have been taken to mean that the defendant must take the stand and make a statement setting forth the reasons for his possession of the narcotics.

The instructions, therefore, clearly transgressed the narrow rule laid down by this Court in *United States* v. *Gainey*, 380 U.S. 63 (1964). That case dealt with a provision in the Internal Revenue Code which the Court recognized as being similar to the narcotics statute involved here.[2] The Internal Revenue Code provided that the presence of a defendant at a site where the business of a distiller was being carried on was sufficient to authorize conviction "unless the defendant explains such presence to the satisfaction of the jury * * *."

Gainey refused to apply this statutory language literally.[3] Instead, the Court made two rulings: First, the better practice is to instruct jurors that "they may draw the inference [of guilt] unless the evidence in the case provides a satisfactory explanation for the defendant's presence at the still, omitting any explicit reference to the statute itself in the charge." 380 U.S. at 71 n. 7.

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[2] After quoting the relevant Internal Revenue Code provision, the Court said: "Similar wording appears in 21 U.S.C. § 174 (1958 ed.), the Narcotics Import and Export Act of 1901* * *." 380 U.S. at 64 n. 2.

[3] Justices Black and Douglas dissented on the ground that despite the Court's narrow interpretation, the instructions under the Internal Revenue Code nevertheless constituted an improper comment on the defendant's failure to testify.

But more importantly, this Court ruled that the trial judge's overall reference in *Gainey* was "carefully directed to the evidence as a whole, with neither allusion nor innuendo based on the defendant's decision not to take the stand." *Id.* at 71.[4]

This latter point was clearly supported by the charge in that case and emphasizes the difference between *Gainey* and the situation here, for the trial judge there told the jury *five* times that *all of the evidence* was to be considered in deciding whether presence at the still site had been satisfactorily explained.[5] These instructions—although not ideal, as the Court itself noted—were deemed to have made the point sufficiently that it is the total evidence, and not a statement from the defendant, that the jury must look to for an explanation of presence at the site of a still.

In the instant case, however, not only did the trial judge fail to state (or even imply) that the total evi-

[4] The Court so ruled even though the defendant-respondents did not argue that the instructions were invalid as a comment on their failure to testify. See *United States* v. *Gainey*, October Term 1964, No. 13, Brief for the Respondents.

[5] Thus, the court instructed that presence "would be a circumstance for you to consider *along with all the other testimony in the case;*" that presence "is a circumstance to be considered *along with all the other circumstances in the case* • • •;" that presence, "*together with other circumstances in the case,* if they are sufficient in your opinion to exclude every [other] reasonable conclusion," would authorize conviction; that presence can authorize conviction "unless the defendant *by the evidence in the case and by proven facts and circumstances* explains such presence to the satisfaction of the jury;" and that the jury need not convict even if the defendant, "*by the evidence in the case, facts and circumstances proved,*" failed to explain his presence. 380 U.S. at 69-70; emphasis added.

dence was to be considered, but he told the jury instead to look to the defendant himself for an explanation. This was done not by "allusion" or "innuendo"—which this Court conceded in *Gainey* would have been improper—but by specific, direct, unqualified, and unmistakable language that none of the twelve jurors possibly could have misunderstood.

The United States can hardly dispute that these instructions were improper, because it set forth the correct rule in its brief to this Court in the *Gainey* case:

> The explanation that overcomes the force of the presumption need not come from the defendant personally or even from his evidence. The explanation may be suggested by any evidence of the facts and circumstances, coming from any source (including the government's own witnesses), that explains how an innocent man happened to be there. Or the jury may reject the presumption because it is satisfied that proof of presence, taken in conjunction with all the other circumstances, will not support an inference that the defendant was, beyond a reasonable doubt, guilty of conduct constituting him a principal or accessory in the substantive offense. The judge so charged the jury in the present case * * *.[6]

We agree with this statement of the law. But it cannot be squared with the instructions at issue here. Nowhere did the trial court in this case tell the jury that the explanation of possession need not come from the defendant personally, that it could come from any source, or that the presumption, even if supported by evidence, could nevertheless be rejected in the light of all the other circumstances. The court not only

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[6] *United States* v. *Barrett* [*and Gainey*], October Term 1964, No. 13, Brief for the United States, p. 13.

failed to make these points but excluded them from consideration by charging that a satisfactory explanation must come from the defendant. Under this charge, even if the jury had found that guilt was precluded by the evidence as a whole or by any part of it,[7] the jury would have had to convict because Pacelli did not personally come forward with an explanation.

During the discussion on the charge, the prosecutor, Mr. Jacobs, recognized that the trial judge was confused. Mr. Jacobs pointed out that the United States was *not* asking for § 174 to be read to the jury (J.A. 369a), that under *Gainey* the jurors should be told that "they can infer from possession knowledge of illegal importation" (J.A. 370a), that this Court disapproved of telling the jury it could infer guilt "unless it is explained away by the defendant" (*ibid.*), that *Gainey* "disapproved" of telling the jury "the defendants [must] unexplain being near the still" (J.A. 372a), that it is better to tell the jurors they could "infer" guilt "unless *the evidence in the case* explains it away" (*ibid.*; emphasis added), and that this Court "didn't think it was [a] good idea to read the statute to the jury and tell them it is a presumption" (*ibid.*). Thus, the prosecutor recognized that

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[7] It is important to remember that the statutory inference does not reduce the offense to one of mere possession; the statute still requires proof that the narcotics were received and concealed, that they were imported contrary to law, and that the defendant knew of the unlawful importation. While possession under the statute creates an inference that each of these three essential elements has been established *prima facie*, an explanation of any one element is sufficient to rebut the entire inference. *Harris* v. *United States*, 359 U.S. 19, 23-24 (1959); *Roviaro* v. *United States*, 353 U.S. 53, 62-63 (1957); *Chavez* v. *United States*, 343 F.2d 85, 88-90 (9th Cir. 1965); *Rodella* v. *United States*, 286 F.2d 306, 310-313 (9th Cir. 960), *cert. denied*, 365 U.S. 889 (1961).

the trial judge was about to make a fatal error, but the judge ignored these admonitions, disregarded *Gainey*, and proceeded to instruct that the defendants must offer an explanation.[8]

It is no answer to say, as the Court of Appeals does (App. 6a), that § 174, upon which the judge relied, has been held constitutional.[9] The cases supporting constitutionality do not even intimate that an instruction such as that given in this case is proper. In *Yee Hem* v. *United States*, 268 U.S. 178 (1924), for example, the Court merely held that the statute does not violate the Fifth Amendment by forcing a defendant to take the stand; he can take the stand or not as he sees fit.[10] It certainly does not follow, as this Court

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[8] The discussion preceding his charge (J.A. 368a-374a, Tr. 3723, especially at J.A. 369a-370a; see also J.A. 494a.) indicates that he was confused by the opinions of the Second Circuit in *United States* v. *Santore*, 290 F.2d 51 (1960), 290 F.2d 74 (1960), *cert. denied*, 365 U.S. 834 (1961), and *United States* v. *Hernandez*, 282 F.2d 71 (1960), 290 F.2d 86 (1961). The trial judge apparently took these opinions to mean that he must charge in the words of § 174 without explanatory or qualifying language. These decisions, of course, preceded *Gainey*. But even more to the point, they simply do not hold what the trial judge took them to hold, and the Court of Appeals does not claim that they do. The only issues decided in those cases were whether possession could be actual or constructive and how possession by one defendant affected a co-defendant.

[9] We do not foreclose or waive the argument that the presumption itself is unconstitutional—either because it forces the defendant to testify or because there is no valid connection between possession and the elements of the crime. *Cf. United States* v. *Romano*, 382 U.S. 136 (1965); *Tot* v. *United States*, 319 U.S. 463 (1943); *Erwing* v. *United States*, 323 F.2d 674, 682 (9th Cir. 1963). See 13 L. ed 2d 1138.

[10] The same is true of the only other cases relied on by the Court of Appeals, *Orozco-Vasquez* v. *United States*, 344 F.2d 827, 829 (9th Cir. 1965), and *United States* v. *Sorenson*, 330 F.2d 1018, 1021 (2d Cir. 1964), *cert. denied*, 380 U.S. 945 (1965).

subsequently made clear in *Gainey*, that if the defendant chooses not to take the stand, the trial court may then comment on that fact by telling the jury that it can convict unless the defendant has satisfactorily explained his possession of narcotics. For the law precludes *every* adverse comment on a failure to testify —whether implied or direct, whether by court or by counsel.[11]

It is quite true, as pointed out by the Court of Appeals, that the District Court also gave the usual charge in this case that the defendants need not be witnesses and that their failure to testify must not be used against them. What the Court of Appeals failed to note, however, was that the adverse instruction on the defendants' failure to testify came at the very outset of the charge (J.A. 444a, Tr. 4136-37), whereas the instruction about their not having to testify was given at the end of the charge—*53 transcript pages later* (J.A. 485a-486a, Tr. 4190). This latter instruction was recited in a single paragraph (three sentences), and was not in any way related by the judge to his prior instruction. Thus, even assuming that the adverse instruction could have been cured by another, conflicting instruction, it certainly was not cured here, where one did not directly follow, refer to or even purport to overcome the other.

But more importantly, this and other courts repeatedly have held that the adverse effect of commenting on a defendant's failure to testify cannot be overcome by the simple expedient of stating that he

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[11] *E.g., Wilson* v. *United States*, 149 U.S. 60 (1893); *Johnson* v. *United States*, 318 U.S. 189, 195-197 (1943); *United States ex rel. Shott* v. *Tehan*, 337 F.2d 990, 991 (6th Cir. 1964), *remanded*, 382 U.S. 406 (1966).

need not testify. Most typical of these cases is *Griffin* v. *California*, 380 U.S. 609 (1965), where the trial court specifically charged the jury that the defendant had a constitutional right not to testify. But the court also instructed that the jury could take into consideration the defendant's failure to "deny or explain" any evidence peculiarly within his own knowledge. Though the case came from a state court, this Court reversed, holding that the charge violated the defendant's rights under the Fifth Amendment, made applicable to the states under the Fourteenth.[12]

It is important to note that while each of these cases—and particularly the *Griffin* case—was argued

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[12] See also *Malloy* v. *Hogan*, 378 U.S. 1 (1964). Similarly, in *United States* v. *Ward*, 168 F.2d 226 (3d Cir. 1948), the trial judge charged that the defendant's failure to take the stand could be weighed by the jury. Even though the judge also instructed that the defendants did not have to take the stand and that their failure to take the stand must not be used to imply guilt, the Third Circuit Court of Appeals reversed. 168 F.2d at 227.

In *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962), the prosecutor stated to the jury during argument:

> The Government would also bring to your attention the fact that the defendant failed to take the stand. No inference at all is to be given to you by the fact that he exercised this right. This is a very important right to the individual; it is an important right in our system of justice. [114 U.S. App. D.C. at 240, 314 F.2d at 245.]

Even though the court instructed the jury "that no inference of guilt arises against the defendant because of his failure to testify as a witness on his own behalf," the Court of Appeals reversed. 114 U.S. App. D.C. at 241, 314 F.2d at 246.

In *De Luna* v. *United States*, 308 F.2d 140 (5th Cir. 1962), the prejudicial comments on the defendant's failure to testify came from a co-defendant's attorney. Although the judge instructed that a failure to testify cannot give rise to any inference against a nontestifying defendant, the Court of Appeals considered it unrealistic to think that *any* instruction to the jury could undo the prejudicial effects of the prior statement, and reversed the conviction. 308 F.2d at 154-155.

to the Court of Appeals, the opinion below does not mention or deal with a single one of them. The Court of Appeals instead relies entirely upon the later instruction and simply assumes that two conflicting instructions somehow canceled each other out.

The Court of Appeals, attempting to find precedent for its decision, said (App. 7a) that it had reached "a similar conclusion" in *United States* v. *Secondino*, 347 F.2d 725 (2d Cir. 1965).[13] No case chosen by the court could better demonstrate Pacelli's contentions, for in *Secondino*, when the trial court read § 174 to the jury, the defendant's attorney specifically called the problem to the court's attention, and the court then brought the jurors back and gave them the following instruction:

> You will recall that just before we left I had indicated to you that it was requested that I read part of the statute and in the statute it said something about possession. You recall that.
>
> Now, that statute that I just read doesn't change the fundamental law that a defendant is presumed innocent until proven guilty beyond all reasonable doubt. Nor does it impose upon the defendant the burden or producing proof that the narcotic drug was lawfully imported *or any other evidence*. As previously stated the burden is always on the prosecution to prove the guilt beyond all reasonable doubt. What the statute means is that upon a trial for a violation thereof, if you should find from the evidence beyond a reasonable doubt that the defendant had possession of the narcotic drug,

[13] The two other cases cited by the Court of Appeals are not in point. In *United States* v. *Christmann*, 298 F.2d 651, 652 (2d Cir. 1962), the defendant testified in her own defense. In *Williams* v. *United States*, 328 F.2d 256, 262 (8th Cir.), *cert. denied*, 377 U.S. 969 (1964), the point at issue here was not even raised. Both of these cases, of course, preceded *Gainey*.

> as charged, the fact of such possession alone, *unless explained to the satisfaction of you,* permits you to draw the inference and find that the narcotic drug was imported contrary to law and to draw the further inference and find that the defendant had knowledge that the narcotic drug was imported contrary to law .
>
> In connection with any explanation a defendant may choose to offer for the possession of a narcotic drug, you are reminded that in the exercise of his constitutional right *the accused need not testify. Possession may be explained through other circumstances and other evidence independent of the testimony of the accused.*[14]

That is precisely the instruction the trial court did *not* give in the instant case. He did *not* tell the jurors that possession could be explained through evidence independent of the defendant's own testimony. On the contrary, he told the jury three times that *the defendant must explain* (J.A. 444a).[15]

The Court of Appeals attempts to avoid a reversal here by reciting that it would "be the better practice," to be "followed in the future," to instruct that the

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[14] Appendix to Defendant-Appellant's Brief, *United States* v. *Secondino* and *Massari*, pp. 87a-88a; emphasis added. The court had also instructed that "A defendant under Title 18 of the United States Code, Section 3481, has an absolute right not to testify and you must not draw a presumption of guilt or any inference against the defendant because he didn't testify. * * * The law does not require the defendant to prove his innocence or to produce any evidence. * * *." *Id.* at 42a, 43a.

[15] Moreover, in *Secondino*, the objection was merely to the reading of Section 174 (see 347 F.2d at 727), and when the trial court instructed the jury further after the objection was made, "No new objection was taken" (*ibid.*). Here, of course, the objection is not merely to the reliance on § 174 but to the additional statements that the explanation of possession had to come from the defendant. And our objection has been preserved and renewed at every appropriate stage of the proceedings. *Supra*, p. 8.

inference can be drawn "unless the evidence in the case provides a satisfactory explanation" (App. 7a-8a), and further that "it would again be wiser practice to state also that the 'explanation' can come from any evidence in the case and that the total evidence should be considered" (App. 9a n. 7):

In the first place, there is no reason to believe that these admonitions will have any greater impact on trial courts in the future than the similar admonition by this Court in *Gainey*, which preceded the charge here and was specifically called to the attention of the District Court not only by defense counsel but by the prosecutor.

But even more to the point, a clear constitutional violation cannot be avoided simply by setting rules for the future. The admonition in *Gainey* was proper because the trial court in that case had rendered a constitutional—although not a perfect—charge. Neither "allusion nor innuendo" was present. Here, no one can possibly deny that the trial court *did* say—three times, in fact—that the defendants must explain, nor can anyone deny that the trial court did *not* say—even once—that the explanation could come from sources other than the defendants' own lips, much less from the evidence as a whole. Petitioner, on trial for a serious offense which resulted in a sentence of eighteen years and a $20,000 fine, was entitled to a constitutional and accurate charge.[16] The Fifth Circuit

[16] The prospective rules which this Court has deemed proper in such cases as *Linkletter* v. *Walker*, 381 U.S. 618 (1965), involve constitutional interpretations established for the first time in the decisions in those cases and therefore unknown to the lower courts at the time of trial. That certainly cannot be said of this case. The trial court below had the benefit of *Gainey*, of a long line of similar cases, and of the specific entreaties of the prosecutor—all of which were ignored.

recently reversed a conviction on Fifth Amendment grounds because the trial judge commented to defense counsel that he could put "your people" on the stand. *Davis* v. *United States*, 357 F.2d 438, 440-442 (1966). Surely that remark did not even approach in seriousness the specific instruction here that the defendant must offer an explanation.[17]

As we told the Court of Appeals during oral arguement, if the jury can be instructed in the words of § 174, that section is perforce unconstitutional. But this Court has avoided that dilemma by interpreting § 174 to mean that an adverse inference may be drawn from possession unless possession is explained by all or any part of the evidence in the case.

That was not the instruction given here. Once the trial court told the jury that Pacelli must explain his possession, and he in fact did not take the stand and therefore did not explain anything, his conviction was a foregone conclusion. The jury had to convict because Pacelli had not explained; no explanation of any kind had issued from his lips. Thus, his very refusal to testify—a refusal protected by the Constitution—became the touchstone of his conviction. The prejudice of such an instruction cannot be obviated or overcome by a conflicting instruction—particularly where, as here, the conflicting instruction follows the unconstitutional comment by 53 transcript pages and is not even worded so as to relate to or overcome the prior error.

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[17] The charge here is similar to those which resulted in reversals in two recent state court decisions, one of which cited *Griffin* and the other *Gainey*. *People* v. *Moore*, 48 Cal. Rptr. 475, 476-477 (D.C. App. 4th Cir. 1966); *State* v. *Knudsen*, 217 A.2d 236 (Cir. Ct. Conn., App. Div. 1965).

B. The trial court erroneously converted the statutory inference into a conclusive presumption and thus violated petitioner's Fifth and Sixth Amendment rights

The Court of Appeals dismissed with only one sentence petitioners' contention that the trial court unconstitutionally converted an inference into a conclusive presumption. The court said:

> Nor do we find any merit in Pacelli's final argument that Judge Bonsal's explanation of the permissible inference in section 174 rendered the inference conclusive because the judge did not sufficiently explain the meaning of the word "inference." [App. 9a.]

But petitioner's contention cannot be dismissed so easily. As the discussion above makes clear, 21 U.S.C. § 174 "has laid down a rule, not of substantive law * * * but merely of evidence."[18] All the statute does, in fact, is to establish an inference of guilt upon proof of possession; it in no way sets up an irrebutable presumption.[19] As the Tenth Circuit has put it:

> The effect of the second paragraph [of § 174] is to insulate the prosecution against the hazard of a directed verdict when nothing more than possession is proved and to *authorize,* but not *require,* conviction when possession, not satisfactorily explained, is established. [*Griego* v. *United States, supra,* 298 F.2d at 848; emphasis added.]

Rebutting the inference does not even require affirmative evidence from the defense. It can be rebutted

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[18] *Ng Choy Fong* v. *United States,* 245 Fed. 301, 305 (9th Cir.), *cert. denied,* 245 U.S. 669 (1917).

[19] *Yee Hem* v. *United States, supra,* 268 U.S. 178; *Griego* v. *United States,* 298 F.2d 845 (10th Cir. 1962); *Dear Check Quong* v. *United States,* 82 U.S. App. D.C. 8, 160 F.2d 251 (1947); *Rosenberg* v. *United States,* 13 F.2d 369 (9th Cir. 1926).

by the Government's own proof or by the record as a whole. The jury can simply ignore it. The only function of the statutory inference, in fact, is to allow the case to go to the jury when possession is shown and there is no additional proof of each element of the crime. As this Court has said, the inference does not even *require* the court to submit the case to the jury, nor does it preclude a judgment notwithstanding the verdict. *United States* v. *Gainey, supra,* 380 U.S. at 68.

It is vitally important, therefore, that the jury be told precisely how the statute is to be applied. Unless the jury is fully aware of the limitations on the inference, the statutory language in practical effect can render the Government's evidence of possession conclusive of guilt, particularly where the defendant has not taken the stand. Such a result would be constitutionally intolerable, for "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Ref. Co.,* 241 U.S. 79, 86 (1916).

The instructions in this case completely failed to inform the jurors of the various alternatives open to them in dealing with the inference. The judge stated that possession, "unless the defendant explains the possession to your satisfaction, may be deemed by you sufficient evidence for you to infer his knowledge of the unlawful importation of the narcotic drug contrary to law;" that the Government contended it had shown possession and the defendants "have not offered an explanation as to their possession;" and that "you may infer" knowledge of illegal importation unless the defendant "has given you a satisfactory explanation of his possession" (J.A. 444a).

The two words "may" and "infer" clearly were not a sufficient explanation to the jury of the limited role played by the statutory inference. The court failed to say specifically that the inference was not conclusive, as this Court was careful to point out had been done in *Gainey*. 380 U.S. at 70. The court failed to say that the inference could be rebutted by a Government witness, by the Government's entire case, by defense evidence other than the testimony of the defendants themselves, or by the record as a whole. It failed to say that the inference could, in fact, be ignored. Instead, the entire thrust of the charge dealing with § 174 was that the *defendants* must rebut the inference. In the case of petitioner, who did not take the stand, the statutory inference thus became a conclusive presumption.

The instructions therefore misstated the statute as interpreted by this Court, and in addition violated petitioner's right to a jury trial under Article III, § 2, of the Constitution and the Sixth Amendment, and to due process of law under the Fifth Amendment.

The public interest in the resolution of these issues can hardly be overstated. Inferences akin to the one set out in § 174 now proliferate in statutes, both federal and state. The proper administration of justice as well as the protection of basic constitutional guarantees require that this Court now make clear, in the wake of *Gainey*, that instructions such as the one given in this case transgress the right of every defendant not to testify and not to have his guilt predetermined by Congress.

II. PREJUDICIAL PUBLICITY GENERATED BY GOVERNMENT SOURCES DESTROYED PETITIONER'S RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY

(a) The New York Daily News articles

On January 11, 1965, almost four months after petitioner Pacelli was indicted, the first of a series of prejudical articles was sensationally featured on the front page of the New York Daily *News*, the largest selling newspaper in the United States with a circulation of 2,170,373 readers.[20] Headlines an inch and a half high proclaimed, "FEAR MOB SLEW DOPE BIG'S GIRL." A sub-title queried: "WAS SHE KILLED TO SEAL HER LIPS?" The story in the column adjoining the photograph recited that the girl's "boy friend, Vince Pacelli, who trafficked in narcotics, was under surveillance at the time of her disappearance." The article stated that the girl, Nancy Sue Shelton, had vanished three months ago, and "Federal authorities fear she may have been murdered because she knew too much—too much about some of the unsavory characters she was known to have associated with."

The front page story was expanded in a five-column article on page 3 under the headline: "FEAR DOPE [illegible] WAS RUBBED OUT—DANCER TALKED TO GRAND JURY AND PROMPTLY VANISHED" (J.A. 50a; App. 39a). The authors stated that Nancy Sue was "Vince Pacelli's girl, and Vince was a man who played it tough in the international dope traffic." Federal narcotics agents were reported as saying that Pacelli "was a member of a ring which smuggled more than $200 million worth

[20] J.A. 46a, 49a; App. 38a. The articles discussed here have been reproduced for the Court's convenience as Appendix B to this petition.

of dope into the U. S. over a five-year period, even using Mauricio Rosal, a one-time Guatemalan ambassador to the Netherlands, as a courier. Rosal is doing a 15-year stretch." The article added that "the feds caught up with a longtime fugitive" who was a "business associate of Pacelli," that Nancy Sue "met Pacelli and became his girl" in Las Vegas, that "Her friends were the wheels in the narcotics traffic," that some of her friends "are behind bars for long terms," and that others "are still walking around, ruining lives with their dope operations." Federal authorities were said to believe that Nancy Sue had been murdered to prevent her from disclosing information to the United States Attorney's Office after Pacelli's arrest.

A third highly prejudicial article appeared on January 12, 1965 (J.A. 51a; App. 40a). Miss Shelton was called the girl friend of "notorious dope smuggler Vince Pacelli." Again, petitioner was described as "active in a mob which imported $200 million in dope into the U. S."

In these three Daily *News* articles alone, Pacelli's name was specifically mentioned fourteen times.

Prior to trial, petitioner's counsel filed motions for a transfer of his trial to another district and for a continuance (J.A. 44a-45a). The trial judge denied the motions and petitioner's request to subpoena witnesses to present testimony on the issue of prejudice (J.A. 52a, 564a).

Before the jury was empaneled, trial counsel for petitioner requested the judge to ask the prospective jurors which newspapers they customarily read so as to determine whether any were regular readers of the

Daily *News*. Significantly, of the twelve jurors ultimately picked for the panel, two responded that they read the Daily *News* regularly (J.A. 69a, 71a), one read "most" of the New York papers (J.A. 73a), and four were never asked which newspapers they read (J.A. 67a, 70a, 72a-73a). Thus, only five members of the regular jury indicated that they were *not* readers of the Daily *News*.[21] Seven of the jurors might well have read the prejudicial articles. At one point, the judge interrupted the *voir dire* and was greeted with a show of hands when he asked the panel how many members read the Daily *News* regularly (J.A. 68a).

None of the jurors was asked specifically about the three damaging articles. Petitioner's counsel exhausted his preemptory challenges and was denied an additional preemptory challenge to remove an alternate juror who read the Daily *News* on the ground that other jurors also read the News (J.A. 79a).[22]

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[21] Compare *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), where a murder conviction was reversed although only three members of the jury had seen the offensive publicity and all testified that they would render an impartial verdict (373 U.S. at 732) (dissenting opinion), and *Marshall* v. *United States*, 360 U.S. 310 (1959) (seven jurors exposed to publicity).

[22] In *United States* v. *Accardo*, 298 F.2d 133, 136 (7th Cir. 1962), the Court of Appeals stated that a factor in its decision to reverse was that defendant had not been offered unlimited peremptory challenges to protect against prejudicial newspaper publicity. Compare *Delaney* v. *United States*, 199 F.2d 107, 116 (1st Cir. 1952), where the Court of Appeals reversed for prejudicial publicity even though defendant's counsel failed to exhaust his preemptory causes, with *Irvin* v. *Dowd*, 366 U.S. 717, 724 (1961), where at the insistence of the accused who had exhausted his peremptory challenges the trial judge questioned certain jury members and received assurances of impartiality.

(b) The Popular Science Article

On June 1, 1965, mid-way in the trial, a six-page "Special Report" appeared in Popular Science Magazine—which in December, 1964, had a circulation of 1,332,895 (J.A. 295a; App. 41a).[23] The magazine was promptly brought to the attention of the trial judge (J.A. 289a). Under the headline, "ONE TOP ANTI-NARCOTICS AGENT TELLS THE INSIDE STORY OF HOW THREE NATIONS COMBINED TO FIGHT THE DOPE SMUGGLING DIPLOMATS," was a detailed story written by the Commissioner of the United States Bureau of Narcotics, Henry L. Giordano, whose picture and biography were prominently featured. Mr. Giordano claimed that the Federal Bureau of Narcotics had brought to justice an international ring of narcotic smugglers, comprised for the most part of the very men who were named as co-conspirators in this case. Photographs of seven of the co-conspirators involved in this case appeared in connection with accounts of their alleged participation in the narcotics ring. Defendant Cahill was also identified as a member of the ring. One of the men named by Mr. Giordano, Charles Bourbonnais, was not only a co-conspirator but a crucial prosecution witness who testified in this case for 486 pages of transcript (Tr. 2131-2617). The article made no reference to the fact that some of the convictions discussed were then under review by the Court of Appeals (J.A. 593a), or that the alleged narcotics operation was at issue in the instant pending trial.

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[23] The magazine was thus *circulated* to one out of every 145 people in the United States and of course enjoyed an even wider readership. In contrast to its position on the magazine article, the Government told the Court of Appeals that so many people read the Daily *News*, it was "impractical" to try to exclude all its readers from the jury (Brief for the United States, p. 54 n.2).

The trial judge stated in strong terms that the Popular Science article should not have been released before the pending trial was concluded, voiced extreme displeasure with the publication and with the Bureau of Narcotics, and repeatedly demanded an explanation.[24] Nevertheless, the court erroneously denied petitioner's motions for a mistrial (J.A. 295a, 298a-299a) and for vacating the verdict (J.A. 597a). Instead, in a general question to the jury, the trial judge simply asked whether any juror had seen "a recent article in a magazine of national circulation" which mentioned some of the witnesses and other people whose names had been heard during the trial (J.A. 300a).[25]

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[24] See, *e.g.*, J.A. 290a, 291a-292a, 294a, 296a, 299a, 589a.

The following statements illustrate the trial judge's reaction to the publication:

"I would like to know how it appeared, that the Bureau of Narcotics let this article get out of here" (J.A. 291a).

"Why did they release it at all before trial? I have trouble with that. And will you get an explanation of that?" (J.A. 291a-292a).

"The Bureau of Narcotics knew there was an indictment pending against these fellows and knew they were to be tried. I would like to get a report on that. * * * I think it is most unfortunate, I must agree" (J.A. 292a-293a).

"I am really very much concerned about this thing. I really think that it is a poor way for the Bureau of Narcotics to run the ballgame, I must confess that" (J.A. 299a).

The Government's totally inadequate explanation of the shocking publication was not provided until the day of sentencing (J.A. 589a-591a).

[25] The trial judge routinely instructed the jurors not to read about the case, narcotics or organized crime, or to listen to or watch programs about these subjects. However, his usual instruction was not to read anything in the "press", "papers" or "newspapers" (*e.g.*, Tr. 145, 331-332, 367, 1092-92a, 1466, 2122a, 2326, 2505, 2632, 3084-85), and no specific mention was ever made about not reading magazines, even after the Popular Science article appeared.

(c) The publicity vitiated a fair trial

The exceptionally prejudicial character of the foregoing articles is readily discernable upon a quick reading. Despite the fact that petitioner's trial had not yet begun, the Daily *News* articles quoted federal narcotics agents as stating flatly that he was guilty of the crime charged—participation in an international narcotics smuggling operation. Petitioner was repeatedly described as a "notorious dope smuggler" and a man who "played it tough" in the dope traffic. Worse yet, the articles made it clear that federal authorities suspected petitioner of complicity in the murder of his missing girl friend, although such a crime has never been charged or established.

The Popular Science article was an authoritative recitation by the United States Commissioner of Narcotics of the criminal conduct leading to the convictions of many of the men named as co-conspirators in the instant indictment for alleged participation in the closely-linked activities of an international narcotics importing ring.

The *News* and Popular Science stories thus constitute the very type of prejudicial information, inadmissible at trial, which repeatedly has been held to vitiate an impartial verdict.[26]

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[26] For example, in *Marshall* v. *United States, supra,* this Court reversed a conviction for unlawfully dispensing drugs where seven jurors were exposed to two news accounts stating that the accused had a prior criminal record and had allegedly committed certain other offenses. Similarly in *United States* v. *Accardo, supra; United States ex rel. Bloeth* v. *Denno,* 313 F.2d 364 (2d Cir.), *cert. denied,* 372 U.S. 978 (1963), and *Coppedge* v. *United States,* 106 U.S. App. D.C. 275, 272 F.2d 509 (1959), reversals were ordered where newspaper articles had included defamatory characterizations and allegations as to criminal conduct by the

But this is far more than the ordinary case of prejudicial publicity. *For here, all of the articles sprang from governmental sources.*

We cannot stress this point too strongly. Despite the fact that it was argued to the Court of Appeals at length, both in our brief and at oral argument, the opinion below does not once mention it.

The Daily *News* articles appeared over three months after Nancy Sue Shelton's disappearance, contained a request for the submission of information to the Government and a promise of protection, and featured statements by the federal authorities as to petitioner's guilt and information which could have been given only by those authorities. It is quite obvious that these articles were instigated—or at the very least substantially filled out for reporters—by the Government. The Popular Science article was authored by the Commissioner of the United States Bureau of Narcotics, a man who could not possibly have failed to note that his article would be published around the time of petitioner's trial.

The Government did not contend before the Court of Appeals that these articles were not generated by Government officials or that this fact was irrelevant. Instead, the Government argued that "Governmental

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defendant other than the offense for which he was then being tried. In *United States* v. *Florio*, 13 F.R.D. 296, (S.D.N.Y. 1952), the court granted the defendant's motion for a change of venue outside New York because a hostile climate had been created by prejudicial stories which referred to the defendant's notorious past and to alleged crimes unassociated with the crime charged in the indictment. An adjournment of several months was granted in *United States* v. *Dioguardi*, 147 F.Supp. 421 (S.D.N.Y. 1956), because newspaper publicity had identified the defendant as a co-conspirator of certain defendants convicted in another trial.

participation" could not compensate for what it called a complete absence of a showing of prejudice. (Brief for the United States, p. 56.) Significantly, the Government conceded in a footnote that "* * * there may be instances where the Government's participation in the publicity might be such as to call forth the Court's sanctions, but such conduct must be extremely gross * * *" (*id.* at 56 n.). We submit that "extremely gross" describes precisely the role of Government officials in this case.

Stories emanating from governmental sources have two vices. First, the reader quite naturally grants maximum credence to assertions of guilt, misconduct and bad character when they are made by persons who hold official titles, who receive governmental sanction, who presumably are in a position to know the facts, and who would seem to have no reason for stating a falsity. The degree of prejudice, in other words, is greatly enhanced when "federal authorities" or "federal agents" are relied upon and quoted. This is true to the ultimate degree when the man who is making the statements is actually in charge of the Federal Government's entire anti-narcotics operations.

Secondly, the Government simply must not be allowed to obtain criminal convictions by methods of this kind. The Government, when it chooses to give prejudicial information to the press or to go so far as to publish that information directly with an official stamp of approval, cannot be allowed the fruits of its own impropriety. These federal authorities knew that trials were imminent or actually under way; what possible excuse could they have had for taking part in these highly prejudicial articles? This case, in essence, is no different from any other in which the

Government has secured a conviction by improper methods and must thereby suffer a reversal.[27]

The Court of Appeals assumed there must be evidence that the jurors read and remembered the particular articles (App. 15a). This assumption runs directly counter to a number of this Court's rulings, the latest being *Sheppard* v. *Maxwell, supra.* There, the Court made patently clear that jurors' assurances of fairness and impartiality, and the absence of any showing of prejudice, are not dispositive of the publicity issue. Rather, it is "the probability of unfairness" that controls. 384 U.S. at 352.[28] And here, in

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[27] *E.g., Plye* v. *Kansas,* 317 U.S. 213 (1942) (evidence vital to the defense intentionally withheld by the prosecution); *White* v. *Ragen,* 324 U.S. 760 (1945) (knowing use of perjured testimony by the prosecution); *Michelson* v. *United States,* 335 U.S. 469, 475 (1948) (improper reference by the prosecutor to the defendant's prior criminal record).

In *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), the defense itself was guilty of engendering publicity—a factor not present here. Nevertheless, this Court took occasion to point out that Coroner Gerber, an Assistant County Attorney, Cleveland Police Captain Kerr, Detective Chief James McArthur and other officials were among those disseminating information to the press, and the Court was moved to observe: "The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action." 384 U.S. at 361.

[28] The Court has also held that where prejudice is "manifest" (*Irvin* v. *Dowd, supra,* 366 U.S. at 724), or "inherently suspect" (*Estes* v. *Texas,* 381 U.S. 532, 543-544 (1965)), sufficient prejudice to the accused for reversal will be presumed. See *Janko* v. *United States,* 366 U.S. 716 (1961), where the Court in a brief *per curiam* opinion reversed the petitioner's conviction upon confession of error by the Solicitor General. The Government conceded that the single article appearing on page 3 of a local paper on the second day of trial was so prejudicial that the trial judge had erred in not interrogating the jurors in order to assure himself as to whether the jurors had in fact read the article. The Solicitor

view of the stories themselves, their source, and the replies of jurors when questioned about their reading habits, the probability of unfairness to Pacelli has been amply demonstrated.

United States v. *Grassia,* 354 F.2d 27, 29-30 (2d Cir. 1965), *pet. for cert. pending,* 35 U.S.L. Week 3002 (Oct. 1966 Term No. 56), has pointed the way to the only proper result here. The court there recognized that under some circumstances, the generating of publicity by the Government may call for the sanction of dismissing the indictment, "in the interest of the particular defendant or for general therapeutic purposes, or for both" (*id.* at 29). We submit that precisely those circumstances are present in the instant case, and that the proper administration of the criminal law would be substantially advanced by a ruling to that effect by this Court.

III. PETITIONER WAS DENIED A FAIR TRIAL AND A UNANIMOUS JURY VERDICT BY THE COURT'S SUBMISSIONS AND INSTRUCTIONS TO THE JURY ON OVERT ACT TEN

The trial court correctly instructed the jury to convict only if it found beyond a reasonable doubt that at least one of two overt acts—number ten or number eleven—had occurred (J.A. 454a, 515a, 520a-522a).

The indictment alleged under overt act ten that: "In further pursuance of the said conspiracy and to effect the objects thereof, in or about March of 1960,

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General expressed "substantial doubt" as to whether the inadmissible prejudicial information could be wiped out of a juror's mind, citing *Marshall* v. *United States, supra.* The article had contained references to the accused's prior criminal record and to the fact that a new trial had been granted previously because four jurors had read newspaper accounts of the charges against the accused.

in the Southern District of New York, the defendant Joseph Armone was in the vicinity of 122 Second Avenue, New York, New York" (J.A. 27a). In reply to Pacelli's subsequent request for a bill of particulars, the Government stated that the tenth overt act occurred "during March or April of 1960, approximately between 1:00 p.m. and 5:00 p.m., inside 207 Second Avenue, New York City" (J.A. 54a).

The address mentioned in the indictment, 122 Second Avenue, is the site of the Amvets Club (J.A. 84a, 90a, 94a, 186, 192), whereas the address specified in the bill of particulars, 207 Second Avenue, is the location of Lulu's Bar (J.A. 157a, 164a-165a, 234a).

The judge told the jurors as to overt act ten that they must find that Joseph Armone had been "in the vicinity of" 122 Second Avenue (the Amvets Club) in furtherance of the conspiracy (J.A. 454a, 526a-527a). The judge added that as he recalled the evidence, overt act ten referred to an incident involving a counterfeit $100 bill (J.A. 454a).

At trial, the sole overt act offered in evidence as having occurred at or near the Amvets Club and not barred by the statute of limitations involved a conversation about whether Hedges could hold back $10,000 out of the $40,000 that he was supposed to pay. This conversation occurred in September of 1959 (J.A. 124a-125a). Several events were testified to as having occurred in or outside of Lulu's Bar, but it is clear from the dates that, regardless of what the jury may actually have *considered,* the only events within the time period specified in the indictment related to conversations about the counterfeit $100 bill and conversations about Hedges needing more money.

In other words, the judge purported to charge overt act ten in terms of the indictment, whereas actually he was specifying one of the events which had occurred at Lulu's Bar and which on cursory inspection would seem to have been intended by the bill of particulars.[29] This was an event which definitely had not been alleged in the indictment. The jurors, on the other hand, had never been told about the bill of particulars, nor had their attention been called to any discrepancies between the indictment and the evidence. Defense counsel objected to the submission of overt act ten to the jury (J.A. 495a-496a, 499a, 501a-502a, 525a-526a), and twice pointed out the variance and confusion between the indictment and the bill of particulars (J.A. 502a, 527a-528a).

After the jury had deliberated for several hours, it requested a reading of the testimony on overt acts ten and eleven (J.A. 522a). In reply to its request for the testimony on overt act ten, the Assistant United States Attorney and the attorney for three other defendants (see J.A. 550a) selected from the trial transcript evidence relating to the conversation about the counterfeit $100 bill, and this evidence was read to the jury (J.A. 523a-524a, 527a). After one hour and fifty-five minutes more of deliberation, the jury submitted the

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[29] Actually, there were even discrepancies between the bill of particulars and the evidence developed at trial. The bill of particulars alleged an event involving Armone in March or April, whereas the evidence showed that the original transaction with the counterfeit $100 bill did not involve Armone, and the later discussion with Armone about the counterfeit $100 bill did not occur until April or May (See J.A. 164a-165a, 193a, 195a, 219a-221a, 234a-245a).

following written memorandum to the judge (Court's Exhibit No. 12):

> Judge Bonsal count 10 states that Joe Armone was in the vicinity of 122 Second Avenue during March, 1960.
>
> When the request was made this afternoon to rehear count 10 testimony, we re-heard testimony that occurred at Lulu's Bar and the lunch counter across the street from Lulu's.
>
> These two locations are five blocks' (approximately) apart.
>
> Can these [scratched out]
>
> [over]
>
> Can 122 2 Ave. be thought of as "the vicinity" or is 122 a different [scratched out] the location of another separate event?
>
> Respectfully
>
> C. Burquist

A defense request that the note be reread was ignored (J.A. 529a).

In his reply to the jury, the judge instructed over Pacelli's objection (J.A. 537a, 539a-540a) that whether 207 Second Avenue was in the vicinity of 122 Second Avenue was a question of fact which the jurors should use their own common sense to resolve (J.A. 538a-539a).

More than a month after the conclusion of the trial, the judge called together counsel for both sides and informed them that he had found from the minutes that the Grand Jury had never been informed about the incident involving the counterfeit $100 bill, and that apparently the Grand Jury intended to base overt act ten on the conversations about Hedges needing more money (J.A. 550a-551a).

The fact is, however, that both the Grand Jury minutes read by the judge and the evidence at trial (J.A. 158a-159a) show that these conversations took place not at the Amvets Club, the address alleged in the indictment, but at Lulu's Bar. The Grand Jury may, in fact, have had an entirely different event in mind in charging overt act ten. The Grand Jury clearly did *not* have in mind the incident involving the counterfeit $100 bill.

The trial judge was correct when he concluded that "we have all been involved in a mistake as to what overt act number 10 was. * * * I think it is a mistake in which we all participated" (J.A. 552a; see also Tr. 4399). He committed reversible error, however, by denying Pacelli's motion to set aside the jury verdict because of the confusion and variance involving overt act ten (Tr. 4396).

If the jury intended to ask whether 207 Second Avenue was in the vicinity of 122 Second Avenue,[30] the facts reveal such total confusion of law and fact in the various submissions to the jury that a fair verdict could not have been reached.[31] Also, the jury's ques-

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[30] We pointed out below that even the jury's note was not clear. The jury may have intended to ask whether "the vicinity" of 122 Second Avenue included acts in or at the same address.

[31] A jury's confusion may be inferred from its inquiry of the trial judge. *Barnett* v. *Love*, 294 F.2d 585 (4th Cir. 1961). And "When a jury makes explicit its difficulties a trial judge should clear them away with complete accuracy. * * * A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States*, 326 U.S. 607, 612, 613 (1946). As a matter of fact, even in civil cases the judge, once he chooses to reply to a jurors' note, cannot mislead them but instead has a duty to be complete, fair and unambiguous in his reply. See *Tipton* v. *Socony Mobil Oil Co.*, 375 U.S. 34 (1963).

tion either made an assumption based on no evidence of record [32] or revealed an improper view of the scene by jurors. In addition, petitioner was deprived of his constitutional right to a unanimous verdict.[33] And finally, the court erroneously left to the jury an issue that should have been resolved by the court.

If the Court does not accept these contentions, it should overrule the dictum of the Second Circuit in *United States* v. *Negro,* 164 F.2d 168 (1947), adopted anew in the opinion below, and hold that the proof at trial of an overt act must conform to the overt act charged in the indictment. As the Court of Appeals conceded (App. 23a-24a), there is authority contrary to *Negro,* and this Court has never approved the *Negro* rationale.

The Court, in fact, indicated in *Stirone* v. *United States,* 361 U.S. 212 (1960); that there are a number

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[32] The Court of Appeals attempts in a footnote (App. 21a n. 13) to glean out of this record some basis for the jury's conclusion as to the distance between 122 and 207 Second Avenue. We leave to the Court whether any jury could have wound its way through the maze set forth in this footnote. But even after its record search, the Court of Appeals could not divine any evidence that pinpointed the distance more specifically than "up to seven blocks".

[33] Certainly Armone's presence at two different places at two different times could not be said to constitute a single act or event. And the jury was not instructed that it must agree unanimously that one or both overt acts had occurred. Thus, the judge's instruction left the jury free to reach a non-unanimous verdict on whether any particular overt act had occurred. Some jurors well might have believed that Joseph Armone was present at 122 Second Avenue, but not at 207. Others may have believed that he was at 207, but not at 122. And yet such completely opposite factual determinations would have supported a verdict of guilty under the court's charge. See *Andres* v. *United States,* 333 U.S. 740 (1948); *American Publishing Co.* v. *Fisher,* 166 U.S. 464 (1897).

of reasons why proof at trial should conform to the indictment—including, in addition to the possibility of surprise and double jeopardy, the preservation of a defendant's right to be free from oppressive prosecution. The Court stated:

> The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. [361 U.S. at 218 [34]]

Here, the Grand Jury had in mind one set of facts involving 122 Second Avenue when it charged overt act ten. The Government, as shown by its bill of particulars, had in mind another incident occurring some blocks away at 207 Second Avenue. The proof was scattered and confused, but apparently the Government intended the conviction to rest on the incident at 207 Second Avenue. In any event, the jury theoretically was instructed upon the basis of the indict-

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[34] The Court then went on to revitalize its early opinion in *Ex Parte Bain*, 121 U.S. 1, 11 (1886), by quoting therefrom:

> Yet the institution [the grand jury] was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passon or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of a oath, that there is good reason for his accusation and trial. [361 U.S. at 218 n. 3.]

ment, yet with evidence cited involving different events. And the jury, after sending its first note about overt act ten, was referred to evidence not about 122 Second Avenue but about 207 Second Avenue. When the jurors pointed out the conflict, the court in effect left the whole matter in their hands. Under these circumstances and in the light of this great confusion, a variance between proof and indictment is manifest, and the prejudice to Pacelli is self-evident.

The Court of Appeals argues that defense counsel joined in focusing on the counterfeit bill. But this ignores the fact that Pacelli's counsel *did* object, not only to the variance between the indictment and the bill of particulars but to the judge's reply to the jury's note.[35] The confusion initiated by the Government and engulfing the defense as well as the trial court cannot now be used as an excuse for the lack of a fair trial. Moreover, the Court of Appeals statement that "there was ample testimony as to the overt act referred to by the trial judge" (*i.e.*, the counterfeit bill conversation) overlooks the fact that because of the instructions, we have no way of knowing whether the jury *did* consider this incident as an overt act. We know only that the Grand Jury never considered it at all.

We submit that at least in a mass conspiracy trial, each defendant is entitled to have the proof submitted to the jury conform to the indictment so that he will adequately be appraised of the charges, so that he will

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[35] J.A. 495a-496a, 499a, 501a-502a, 525a-528a, 537a, 539a-540a. *Cf. Jackson* v. *United States*, —— U.S. App. D.C. ——, 359 F.2d 260 (1966).

thereafter not run the risk of double jeopardy, and so that he will be free from oppressive prosecution.[36]

CONCLUSION

Each of the points discussed above requires a reversal of petitioner's conviction. But in addition, we ask the Court to view all of these points as part of a whole, for the Court has rightly pointed out that the mass conspiracy trial is fraught with dangers to the individual defendant. *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Kotteakos* v. *United States*, 328 U.S. 750 (1946). When as many errors as occurred here take place in the setting of a conspiracy trial, the individual defendant's rights are totally vitiated.

Respectfully submitted,

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[36] *Berger* v. *United States*, 295 U.S. 78 (1935); *United States* v. *Wills*, 36 F.2d 855 (3rd Cir. 1929); *Meyers* v. *United States*, 3 F.2d 379 (2d Cir. 1924); *Remus* v. *United States*, 291 Fed. 501 (6th Cir. 1923); *Grandi* v. *United States*, 262 Fed. 123 (6th Cir. 1920); *Harrison* v. *United States*, 200 Fed. 662 (6th Cir. 1912).